ties so as to discover the standard of diligence by which the case is to be measured. When the duty of utmost caution is on the defendant, as in the case where the contract relation of passenger and carrier exists,[10] the rule is, of course, most readily applied. But it is by no means necessary to find such an obligation,[11] for certain events may well be thought to bespeak the lack of even ordinary care.[12] Since, therefore, the phrase *res ipsa loquitur* is fundamentally nothing but an expression of inductive logic, there is no valid reason for denying, as has positively been done,[13] the possibility of its ever being applied to a controversy between master and servant. The recent case of *Missouri, Kansas & Texas Ry.* v. *Cassady* (Tex. Civ. App. 1915) 175 S. W. 796, states the sound view that *res ipsa loquitur* may be relied on between master and servant when the facts of the injury permit. The necessity for producing a case that forbids any inference of assumption of risk,[14] or the negligence of a fellow servant,[15] may tend as a matter of fact to reduce the number of instances in which *res ipsa loquitur* will be available in behalf of a servant, but certainly should not prevent its operation when a proper case is shown.[16]

JURISDICTION AND PROCEDURE OF STATE COURTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.—The principal changes wrought by the Second Federal Employers' Liability Act[1] in existing law, in addition to the entrance of the Federal government into a field heretofore occupied exclusively by common law or state legislation are: (1) the abolition of the fellow servant rule;[2] (2) the substitution of the rule of comparative negligence for that of contributory negligence;[3] and

[10]See Cleveland etc. Ry. *v.* Hadley (Ind. 1907) 16 L. R. A. [N. S.] 527, and note.

[11]1 Columbia Law Rev., 398.

[12]John *v.* Nor. Pac. Ry. (1910) 42 Mont. 18.

[13]Danner *v.* Wells (1915) 248 Pa. 105; Patton *v.* Texas & Pac. Ry. (1901) 179 U. S. 658; Chicago Tel. Co. *v.* Schulz (1905) 121 Ill. App. 573; 1 Beven, Negligence (3rd ed.) 130.

[14]Thompson *v.* California Cons. Co. (1905) 148 Cal. 35.

[15]Casey *v.* Wynatol Realty & Hotel Co. (1915) 153 N. Y. Supp. 389.

[16]Cochran *v.* Young-Hartsell Mills Co. (N. C. 1915) 85 S. E. 149; O'Connor *v.* Mennie (Cal. 1915) 146 Pac. 674; Marceau *v.* Rutland R. R., *supra*; Houston *v.* Brush (1894) 66 Vt. 331.

[1]Act of April 22nd, 1908, c. 149, 35 U. S. Rev. Stat. L. 65. Since the operation of the act is confined to employees of an interstate carrier while engaged in interstate commerce the act is constitutional. Second Employers' Liability Cases (1912) 223 U. S. 1.

[2]§§ 1 & 2. Devine *v.* C. R. I. & P. R. R. (Ill. 1914) 107 N. E. 595. See also N. P. R. R. *v.* Maerkl (C. C. A. 1912) 198 Fed. 1; Central R. R. *v.* Colasurdo (C. C. A. 1911) 192 Fed. 901, affirming 180 Fed. 832. The abolition of the fellow servant rule is recognized either expressly or impliedly in almost every decision under the act and the very plainness of the act itself forbids questioning.

[3]§ 3. Horton *v.* S. A. L. R. R. (1911) 157 N. C. 146; Bombolis *v.* Minneapolis & St. L. R. R. (Minn. 1914) 150 N. W. 385; Grand Trunk Western Ry. *v.* Lindsay (1914) 233 U. S. 42. But see Atchinson T. & S. F. Ry. *v.* Hines (C. C. A. 1913) 211 Fed. 264. Contributory negligence only goes to the diminution of damages. Fish *v.* C. R. I. & P. R. R. (Mo. 1914) 172 S. W. 340; White *v.* Central Vt. Ry. (1914) 87 Vt. 330; Neil *v.* Idaho & W. N. R. R. (1912) 22 Idaho 74.

(3) the complete elimination of the defenses of contributory negligence and assumption of risk in cases where "the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee".[4]

The recent case of *Louisville & N. R. R.* v. *Stewarts' Adm'x.* (Ky. 1915) 174 S. W. 744, illustrates the effect of the act upon procedure in state courts in an action to enforce liability under its provisions. The law of Kentucky permits nine or more of the jury to return a verdict;[5] and in this suit arising under the federal act the judge instructed the jury to that effect. It was objected that since trials in state courts must be controlled by federal law, the unanimous verdict of twelve jurors is required by the seventh amendment to the Constitution of the United States. The court, following a dictum in a previous decision,[6] overruled the objection. In doing so the court was clearly correct, for though it is well settled that Congress under the Commerce Clause of the Constitution[7] has general power to regulate the relation of master and servant when both are engaged in interstate commerce,[8] from which it follows as a matter of course that state legislation and common law remedies covering the same field as the acts are *ipso facto* superseded;[9] yet the act does not attempt to regulate the procedure of state courts nor to impose limitations on the method of trial. Furthermore, the decision of the Kentucky court is amply supported by other decisions directly in point.[10] Care should be taken, however, in distinguishing matters of procedure from those of substantive law. For example, the question of burden of proof in the defense of contributory negligence, though apparently relating to the procedure alone, in reality depends upon the court's view of what facts the plaintiff must prove to establish his case. Thus, in the recent case of *Central Vermont Ry.* v. *White* (1915) 35 Sup. Ct. 865, it was held that the state court must apply the federal rule in this regard to cases arising under the act.

[4] §§ 3 & 4. S. A. L. Ry. *v.* Horton (1914) 233 U. S. 492. There seems to have been some difference of opinion as to just how far the statute did go in abolishing the defense of assumption of risk before the decision of this case. See Central Vt. Ry. *v.* Bethune (C. C. A. 1913) 206 Fed. 868; Wright *v.* Y. & M. V. Ry. (D. C. 1912) 197 Fed. 94, aff'd. 207 Fed. 281.

[5] Kentucky Stat. 1909, § 2268.

[6] C. & O. Ry. *v.* Kelly's Adm'x (1914) 161 Ky. 655.

[7] U. S. Const., Art. I, § 8.

[8] The Employers' Liability Cases (1908) 207 U. S. 463; Second Employers' Liability Cases, *supra*; Michigan Central Ry. *v.* Vreeland (1913) 227 U. S. 59. *Contra*, Howard *v.* Ill. Cent. R. R. (C. C. 1907) 148 Fed. 997, reversed in Employers' Liability Cases, *supra*; Brooks *v.* So. Pac. R. R. (C. C. 1906) 148 Fed. 986; Hoxie *v.* N. Y. etc. R. R. (1909) 82 Conn. 352, reversed in Second Employers' Liability Cases, *supra*.

[9] Second Employers' Liability Cases, *supra*. But it should be noted that it is unnecessary in any case to plead the statute itself but only the facts relied on; and if they do not warrant a recovery under the Federal statute and do under a state statute a judgment may be given under the latter. Mo. K. & T. R. R. *v.* Wulf (1913) 226 U. S. 570; St. Louis S. F. & T. R. R. *v.* Seale (1913) 229 U. S. 156; Bradbury *v.* C. R. I. & P. R. R. (1910) 149 Iowa 51.

[10] St. Louis & S. F. R. R. *v.* Brown (Okla. 1915) 144 Pac. 1075; Bombolis *v.* Minneapolis & St. L. R. R., *supra*; Winters *v.* Minneapolis & St. L. R. R. (1914) 126 Minn. 260. See Howell *v.* A. P. C. L. R. R. (S. C. 1914) 83 S. E. 639.

And it is also settled that who are fellow servants within the meaning of the act is to be determined by the rule of the United States Supreme Court and not by the rules of the state courts.[11]

Before the Amendment of 1910[12] to the Federal Employers' Liability Act, passed with a view to settling definitely the question of jurisdiction of state courts,[13] all cases arising under the act were removable under the ordinary rules of removal to federal courts.[14] And even after the express prohibition against removal in the amendment it was still doubted whether this prevented removal in the case of diverse citizenship.[15] But the great weight of authority is against the right to remove for any reason.[16] That the question is still undecided in all its aspects is evidenced by the recent case of *Strother* v. *Union Pacific R. R.* (D. C., W. D., Mo. 1915) 220 Fed. 731. In that case the plaintiff in two counts in his petition had stated causes of action arising under the Federal act and under a Missouri statute. The action was removed to the federal courts on the petition of the defendant, there being the necessary diversity of citizenship between the parties. The federal court on motion to remand, held the removal proper, for the reason that the plaintiff by joining a cause of action under the federal act with one under a state statute, had waived his privilege against removal. But under a similar state of facts, the opposite result was reached by the District Court for the Southern District of New York.[17] An application of the rule in the *Strother Case* would serve to circumvent in many instances the plain intention of Congress as expressed in the Amendment of 1910. Because, if the facts were properly pleaded it would be impossible to tell before the conclusion of the introduction of evidence whether a recovery was to be had under the common law, a state statute, or the federal act, and the plaintiff would in this way be deprived of the benefit of choosing the forum in which the action is to be tried.[18]

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[11]Zikos *v.* Ore. etc. Ry. (1910) 113 Minn. 49.

[12]Act of April 5th, 1910, c. 143, 36 U. S. Rev. Stat. L. 291. The material part of this amendment for the purpose of this discussion reads as follows: "§ 6, * * * The jurisdictions of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

[13]Prior to the passage of the amendment, state courts had generally recognized it as their right as well as their duty to take jurisdiction of cases arising under the act. Bradbury *v.* Chicago etc. R. R., *supra*; St. Louis etc. R. R. *v.* Geer (Tex. Civ. App. 1912) 149 S. W. 176; Second Employers' Liability Cases, *supra*. *Contra,* Hoxie *v.* N. Y. etc. R. R., *supra*; Mondou v. N. Y. etc. R. R. (1909) 82 Conn. 373, overruled, see note 8. But after the decision in the Hoxie Case, *supra,* Congress expressly recognized the concurrent jurisdiction of state courts, see note 12, *supra,* without of course attempting thereby to enlarge the existing jurisdiction of state courts.

[14]Lemon *v.* Louisville & N. R. R., *supra*; Hubbard *v.* C. etc. R. R. (C. C. 1910) 176 Fed. 994.

[15]See Van Brimer *v.* Tex. & P. Ry. (C. C. 1911) 190 Fed. 390.

[16]Hulac *v.* C. & N. W. R. R. (D. C. 1912) 194 Fed. 747; Kansas City So. Ry. *v.* Cook (1911) 100 Ark. 467; Pankey *v.* Atchison etc. Ry. (1914) 180 Mo. App. 185; Eng. *v.* S. P. Ry. (D. C. 1913) 210 Fed. 92.

[17]Ullrich *v.* N. Y. etc. R. R. (D. C. 1912) 193 Fed. 768.

[18]*Cf.* Thomas *v.* C. & N. W. Ry. (D. C. 1913) 202 Fed. 766.